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IN THE

Supreme Court Of The United States

October Term, 1994

MICHAEL G. TYSON,

Petitioner,

v.

CLARENCE TRIGG, Superintendent of the Indiana Youth Center, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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Respondents' Brief In Opposition

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should review the Seventh Circuit's decision that Tyson's challenge to an abandoned system of case assignment which, by Tyson's own admission, resulted in an impartial judge, would create a "new rule" that cannot form the basis of federal habeas corpus relief under *Teague v. Lane,* 489 U.S. 288 (1989), and its progeny.

2. Whether this Court should review the lower courts' case-specific holdings that a state court trial judge either did not violate Tyson's Sixth Amendment rights by excluding the collateral impeachment testimony of three surprise witnesses due to Tyson's breach of a discovery order or, at most, committed harmless error under *Brecht v. Abrahamson,* 507 U.S. _, 113 S.Ct. 1710 (1993).

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STATEMENT

1. On September 9, 1991, in Superior Court, Marion County, Indiana, petitioner Michael G. Tyson was indicted on two counts of criminal sexual deviate conduct and one count each of forcible rape and confinement. On February 10, 1992, after a fifteen day jury trial, Tyson was convicted by jury on two counts of criminal sexual deviate conduct and forcible rape. Tyson was sentenced to ten years in prison, of which four were suspended. On March 25, 1995, after serving three years, Tyson was released from prison to the Marion County Probation Department. Because he will remain on probation for four years, Tyson is technically still "in custody" for purposes of 28 U.S.C. § 2254. *See Jones v. Cunningham*, 371 U.S. 236 (1963).

The evidence against Tyson was considerable. In addition to the victim's graphic and detailed testimony concerning how Tyson forcibly raped her (R.3144-53), there was physical evidence of a forcible rape. A medical examination disclosed two abrasions on the opening of the victim's vagina that were "caused by 'a lot of' frictional force" (R.3699, 3700, 3705) and which were consistent with an injury from non-consensual intercourse. (R. 3797)[1] The victim's testimony was also corroborated by four witnesses who each testified that the victim had told them that Tyson had raped her. (R.3013, 3016-17; R.4030-31; R.4092-94; R.4129-30) In addition, both a hotel employee and Tyson's limousine driver testified to the victim's manner as she left the hotel and reentered the limousine after the rape. (R.3463-66, 3631-34) There was evidence that the victim's clothing had been ripped and torn, and a piece left in Tyson's hotel room. (R.3146-52,

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[1] R. refers to Tyson's state-court trial record of proceedings that was prepared for his direct appeal and PCR-R. refers to Tyson's state-court post-conviction relief record of proceedings that was prepared for his post-conviction appeal. Both were before the district court and the court of appeals in Tyson's habeas proceedings.

3479) Finally, there was evidence that Tyson and his party left the hotel abruptly at 4:00 a.m., shortly after the rape, leaving money and clothing in the hotel room. (R.3414, 3475, 3477, 3619, 3643-50)

2. On appeal, the Indiana Court of Appeals affirmed Tyson's conviction, the Supreme Court of Indiana denied transfer, and this Court denied certiorari. *Tyson v. State,* 619 N.E.2d 276, *trans. denied, cert. denied,* _ *U.S.* _, 114 S.Ct. 1216 (1994). While his direct appeal was pending in the Indiana Court of Appeals, Tyson filed two petitions for post-conviction relief (a collateral proceeding in the State system) which were pending at the time Tyson sought federal habeas relief, but which were subsequently abandoned.

Following completion of his direct appeal, Tyson sought federal habeas relief in the United States District Court for the Southern District of Indiana, Indianapolis Division. As he had in his state appeal and prior certiorari petition, Tyson raised the case assignment and witness exclusion issues that form the core of his instant petition. The respondents defended his attack on the case assignment system on the ground that it called for a "new rule" not available in habeas, and that it failed on the merits. Similarly, respondents defended the witness exclusion issue on the alternative grounds that the State courts had acted well within the broad parameters of the Sixth Amendment and that any error was harmless.

The district court denied Tyson's federal habeas petition, rejecting both claims on the merits. *Tyson v. Trigg,* 883 F.Supp. 1213 (S.D.Ind. 1994). The district court found that the manner in which Tyson's case was assigned to the trial judge did not violate his constitutional rights because he did not allege that the trial judge was either biased or prejudiced and in fact admitted just the contrary. 883 F.Supp. at 1216-17. The district court also rejected Tyson's claim that

the exclusion of his three surprise collateral impeachment witnesses violated his Sixth Amendment rights because "the exclusion of evidence of marginal relevance to the pivotal issues is not a disproportionately severe sanction and did not deprive Tyson of his right or opportunity to present a defense." 883 F.Supp. at 1219.

Tyson appealed, and the Seventh Circuit affirmed the district court's denial of relief, though it did so on the alternative grounds urged by respondents. *Tyson v. Trigg,* 50 F.3d 436 (7th Cir. 1995), *reh'g denied.* After reviewing the bases for Tyson's case assignment challenge extensively, and "assum[ing] for purposes of this decision that the absence of precedent is not always fatal," 50 F.3d at 440, the Court held that the claim would create a new rule, "the kind of exploratory venture that *Teague* tells us not to embark on in a habeas corpus case." 50 F.3d at 442. On the witness exclusion issue, after extensively canvassing both the law and the factual record, the Court concluded it need not decide the constitutional issue, 50 F.3d at 446, because in light of the other evidence "we cannot believe that the exclusion of the surprise witnesses had a substantial and injurious effect on the jury's deliberations." 50 F.3d at 447. A concurring judge wrote separately to make clear that he would have found constitutional error, but agreed with the majority that any such error was harmless. 50 F.3d at 449-53 (Flaum, J., concurring).

It is these holdings — (1) that his challenge to the case assignment system would result in a "new rule," and (2) that any error in excluding his three surprise collateral impeachment witnesses was harmless, that Tyson seeks to have reviewed in this Court.[2]

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[2] Given the Seventh Circuit's refusal to reach the merits on either constitutional issue, it would be inappropriate for this Court to do so. Even if this Court granted review and reversed, a highly unlikely contingency, the appropriate course would be to remand to the Seventh

REASONS FOR DENYING THE WRIT

This case does not present "special and important reasons" for the exercise of this Court's discretionary certiorari jurisdiction. The Seventh Circuit fully considered and correctly decided the issues. More importantly, the key considerations on *certiorari* — a conflict among the circuits or a recurring issue that could have widespread impact on the law or the administration of justice — are absent. Rather, this case principally raises highly fact-bound issues that concern only this petitioner's conviction, one under which he is no longer even incarcerated. With the exception of one issue that would likely not even be dispositive of the case, Tyson identifies no confusion or conflict among the circuits.

The two key issues here are largely fact-bound, highly unlikely to recur, and have no substantial impact beyond the immediate parties. The method of case allocation challenged by Tyson is no longer in use in the state trial court, and Tyson has not claimed that it is used in other parts of the country. *See* 50 F.3d at 439. Whether the state trial court's discretionary exclusion of three surprise collateral impeachment witnesses was harmful, or even erroneous, is a tedious, highly fact-specific inquiry, the outcome of which is unlikely to provide guidance to the lower courts on any issue of significance. The state trial court conducted a highly fact-specific inquiry that balanced Tyson's Sixth Amendment interests against the legitimate demands for orderly procedure required by the adversary process in a manner well in line with the decisions of this Court. The district court found no error at all, and the Seventh Circuit, without reaching that question, found that any possible error was harmless. It would serve absolutely no purpose for this Court to delve into the record to review these case-specific determinations.

Circuit to consider the merits of the issues.

While Tyson technically identifies a conflict over how harmless error is applied on habeas review, that conflict is not a compelling reason for review in this case. Not only is there significant doubt whether there is error in this case *at all*, whether harmless or not, but the supposed conflict antedates this Court's more recent decisions in *O'Neal v. McAninch*, _ U.S. _, _, 115 S.Ct. 992, 994 (1995) and *Kyles v. Whitley*, _ U.S. _, _, 115 S.Ct. 1555, 1567 (1995), which clarify that *Brecht* is the appropriate standard to apply on federal habeas review.

Tyson's petition makes virtually no attempt to show how his case meets the standards this Court normally applies in determining whether to grant certiorari, but concentrates instead on an effort to persuade the Court that his individual claims of error have merit. That alone is not sufficient to warrant the "commitment of scarce judicial resources" that a grant of certiorari represents. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). Accordingly, the writ should be denied.

I. The Court Should Not Review The Seventh Circuit's Decision That Tyson's Attack On An Abandoned Selection Process Which, By His Own Admission, Resulted In An Impartial Judge, Would Constitute A "New Rule" Under *Teague*.

There is no reason for this Court to review whether Tyson's challenge to an abandoned case allocation system would create a new rule for which relief is unavailable on habeas review. This Court has repeatedly fleshed out the contours of the "new rule" doctrine, and Tyson makes absolutely no showing that the lower courts are split or are otherwise having difficulty applying it. Thus, this case does not present an issue of widespread national importance of the type that usually impels this Court to grant certiorari. This conclusion is particularly true because the court of appeals

correctly applied this Court's "new rule" jurisprudence, and even if it did not, Tyson's claim would fail on the merits in any event.

Tyson identifies no reason whatever for this Court to grant certiorari on the "new rule" issue. This Court has issued repeated decisions in this area over the last several years. *E.g. Goeke v. Branch*, _ U.S. _, 115 S.Ct. 1275 (1995); *Caspari v. Bohlen*, _ U.S. _, 114 S.Ct. 948 (1994); *Gilmore v. Taylor*, 508 U.S. _, _, 113 S.Ct. 2112, 2116 (1993); *Graham v. Collins*, 506 U.S. 461 (1993); *Butler v. McKellar*, 494 U.S. 407, 412 (1990); *Saffle v. Parks*, 494 U.S. 484, 488 (1990); *Penry v. Lynaugh*, 492 U.S. 302, 313, 329 (1989); *Sawyer v. Smith*, 497 U.S. 227, 236 (1990); *Stringer v. Black*, 503 U.S. 222, _, 112 S.Ct. 1130, 1135 (1992). Tyson does not even *purport* to identify any confusion in the lower courts that would justify yet another plenary consideration by this Court.

In fact, Tyson's suggestion that the Seventh Circuit erroneously required a prior case exactly matching the claim presented as the *sine qua non* of whether a rule is old or new, and rejected his claim even though there is a "long unambiguous historical record," Pet. 25, is refuted by the Seventh Circuit's opinion:

> We may assume for purposes of this decision that the absence of a precedent is not always fatal, ... A rule might be so unexceptionable that it had never been drawn into question in a reported case.

50 F.3d at 440.

Rather, the Seventh Circuit found that Tyson was urging a "new rule" because it found that the historical record was *not* unambiguous and because the examples on which Tyson relied were "readily distinguishable." *Id.* As the court noted "Generalities about fair trials and evenhanded justice are not

a substitute for specific holdings as a basis for a state prisoner's claiming in a federal habeas corpus proceeding that an established right of his was infringed." 50 F.3d at 440 (citing *Sawyer*, 497 U.S. at 236).

In sum, the Seventh Circuit's application of the "new rule" doctrine is unexceptionable and undoubtedly correct. This, apart from the utter lack of any reason this Court should again revisit that doctrine, provides ample reason for denying certiorari.[3]

Finally, even if it were otherwise appropriate to grant plenary review of Tyson's "new rule" issue, the Court should deny the writ because the underlying due process claim fails on the merits. In fact, this failure was the basis of the district court's denial of relief. Moreover, all of the lower courts found, as a factual matter, that there was no evidence that Tyson's case was filed on anything but a random basis and, more important, that the judge was unbiased and impartial, a fact which Tyson expressly conceded. (R.360-61, 5683) 619 N.E.2d at 300, 301 & n.34 (dissent); 883 F.Supp. at 1217; 50 F.3d at 439. Thus, Tyson was left with the claim that the fact that the prosecution could select (indeed could not avoid selecting) which of several courts in which to bring charges created either a sufficient risk or a sufficient appearance of bias as to be absolutely void under the Constitution.

To simply state such a claim is virtually enough to refute it. Federal prosecutors routinely must decide where to file charges among several district courts for offenses in which venue is proper in more than one district. Within the state system, a prosecutor may also have an option to file in

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[3] Tyson's attempt to bring his new rule within the *Teague* exceptions was so weak that the Seventh Circuit did not even explicitly discuss it, except to note that "The right to a judge who is free from the mere *appearance* of partiality is not part of due process at all, let alone a fundamental part." 50 F.3d at 442.

circuit, superior, district, municipal or juvenile court. Each of these opportunities presents some possibility of forum shopping, but none has ever been thought of as violating the Constitution. Rather, in a case relied upon by Tyson, then-Justice Rehnquist specifically recognized that lawyers sometimes "'shop[]' for a judge," but he neither stated nor implied that such actions violated the Constitution. *Laird v. Tatum,* 409 U.S. 824, 835 (1972). In fact, his comments were made in the context of *rejecting* a motion that he disqualify himself.

As this Court has noted, "most matters relating to judicial disqualification [do] not rise to a constitutional level." *Aetna Life Insurance Co. v. Lavoie,* 475 U.S. 813, 820 (1986) (quoting *FTC v. Cement Institute,* 333 U.S. 683, 702 (1948)). This Court has recognized that not "[a]ll questions of judicial qualification. . . involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." *Id.* (quoting *Tumey v. Ohio,* 273 U.S. 510, 523 (1927). Indeed, this Court has noted that even a violation of the Canon of Judicial Conduct requiring a judge to disqualify himself where he has a personal bias or prejudice concerning a party "would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause." *Id.* Rather, the Court noted that the guidelines of due process give the states substantial latitude in such matters. *Id.* 475 U.S. at 821.

Though Tyson purports to rely on prior decisions of this Court, the Court has presumed bias in the manner he suggests only in "situations. . . in which experience teaches that the possibility of actual bias is too high to be constitutionally tolerable." *Withrow v. Larkin,* 421 U.S. 35, 47 (1975). That happens only when a particular influence judged "under a realistic appraisal of psychological tendencies and human weakness" poses "such a risk of actual bias or prejudgment

that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Id. See also Aetna Life Insurance,* 475 U.S. 813 (state court Justice who cast deciding vote in case recognizing bad faith tort on partial failure to pay insurance claim had similar claim pending, and received $30,000 settlement following decision); *Ward v. Village of Monroeville,* 409 U.S. 57 (1972) (because he was responsible for city's finances, mayor could not sit as judge in court whose fines, forfeitures, costs and fees formed "a major part of village income"); *In re Murchison,* 349 U.S. 133 (1955) (judge had acted as "one-man grand jury" in investigating charges of police corruption, then tried police officer for contempt because he believed answers that officer had given were perjurious); *Offutt v. United States,* 348 U.S. 11 (1954) (judge exchanged insults with a lawyer through the entire course of a lengthy trial then held him in contempt at its conclusion); *Tumey,* 273 U.S. 510 (judge would receive costs only if defendant was convicted).[4]

As the Seventh Circuit correctly concluded, this is not such a case. Thus, even apart from the fact that there is no reason for the Court to review the Seventh Circuit's entirely correct "new rule" analysis, it ought not squander its scarce resources reviewing a case assignment system that is no longer in use and that was constitutional in any event.

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[4]Even if Justice Scalia's concurrence in *Weiss v. United States,* _ U.S. _ _, 114 S.Ct. 752, 771 (1994), represented the views of the full court, it addressed a situation in which judges could be removed from office by the Executive — a situation not comparable to this case.

II. The Court Should Not Review The Lower Courts' Decisions That The State Court Trial Judge's Discretionary Decision To Exclude The Collateral Impeachment Testimony Of Tyson's Three Surprise Witnesses Due To Tyson's Breach Of A Discovery Order Did Not Violate Tyson's Sixth Amendment Rights, Or At Most, Was Harmless Error.

Just as it makes no sense for this Court to fly-speck the Seventh Circuit's "new rule" analysis, neither should it review that court's determination that Tyson's witness exclusion claim presented a case of what was at most harmless error. A court of last resort simply ought not spend its time with such case-specific, fact-bound minutiae, particularly where, as here, the result of that inquiry may not even be outcome determinative in this case.

The district court rejected Tyson's claim on the merits, finding the testimony that Tyson's three surprise witnesses would have offered - that Tyson and an unidentified woman believed to be the victim were holding hands and embracing - was collateral impeachment evidence of "marginal relevance to the pivotal issue" and which "would not have added or subtracted one whit from the evidence of what actually took place in Tyson's hotel room." 883 F.Supp. 1218. [5]

The Seventh Circuit took a different but related tack, and rather than ruling on the merits of the Sixth Amendment

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[5] None of the three witnesses ever identified the woman they allegedly saw in the limousine as the victim. (R.1189-93) To the contrary, based on their descriptions of the woman's physical appearance, her apparel, the color of the limousine, and based on the testimony of the employees working at the hotel, the State maintained that the witnesses actually observed Tyson with his girlfriend, Angela Boyd (also known as B Angie B) the night prior to the rape. (R.1326-29, 3439-45, 3598) Evidence at trial showed that on the previous evening, Tyson and Boyd arrived at the hotel by limousine and that Boyd was "embracing and kissing and hugging all over Mr. Tyson." (R.3598, 4978-80)

issue, found that the evidence was sufficiently tangential that its exclusion, if error at all, was harmless because:

> It is not as if this were a case where the only evidence of rape is the witness's testimony. There was, as we noted, physical evidence of rape. There was the testimony of the limousine driver about [the victim's] manner when she reentered the limousine. There was also evidence that her clothing had been torn, and a piece left in Tyson's hotel room. There was the precipitous flight from the hotel by Tyson and his party. Given all the evidence and all the opportunities afforded and taken for impeaching [the victim's] testimony, we cannot believe that the exclusion of the surprise witnesses had a substantial and injurious effect on the jury's deliberations. [citations omitted]. We do not have even a "grave doubt" on this score. *O'Neal v. McAnnich*, _ U.S. _, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995).

50 F.3d 447. It makes no sense for this Court to review this fact-bound harmless-error question on certiorari, as it makes no difference to any case but Tyson's, and perhaps not even to his, as both the Indiana Court of Appeals and the district court found that the mid-trial decision to exclude such marginal evidence based on Tyson's nondisclosure and prejudice to the state was not error *at all*.

Moreover, although Tyson identifies a technical Circuit conflict over the harmless-error standard - noting that the Eight Circuit has, in the past, applied the "harmless beyond a reasonable doubt" standard of *Chapman v. California,* 386 U.S. 18 (1967), in habeas cases where the state courts found no error, while the Seventh Circuit in this case applied the standard this Court said in *Brecht* applies to habeas - even

that is insufficient to warrant review in this case for several reasons.

First, as noted above, the harmless error inquiry may not even be outcome determinative in this case. It would ill serve either this Court or the cause of justice for this Court to engage in plenary review of harmless-error analysis only to have the Seventh Circuit on remand agree with the State courts and district court that there was no error.

Second, the Eighth Circuit's unusual approach antedates this Court's more recent guidance in *O'Neal*, _ U.S. at _, 115 S.Ct. at 994, in which the Court reiterated the *Brecht* standard and clarified the role of that standard, noting that "when a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless." *See also Kyles*, _ U.S. at _, 115 S.Ct. at 1566-67.

Finally, the Seventh Circuit's conclusion that *Brecht* and not *Chapman* applies on habeas review was clearly correct. In *Brecht*, this Court left no doubt that *Chapman's* "harmless beyond a reasonable doubt" standard does not apply on habeas review:

> Moreover, granting habeas relief merely because there is a "'reasonable possibility'" that trial error contributed to the verdict, *see Chapman v. California*, 386 U.S., at 24, 87 S.Ct., at 828 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86, 84 S.Ct. 229, 230, 11 L.Ed.2d 171 (1963)), *is at odds with the historic meaning of habeas corpus* - to afford relief to those whom society has "grievously wronged." . . . The imbalance of the costs and benefits of applying the *Chapman* harmless-error standard on collateral review counsels in favor of

> applying a less onerous standard on habeas review of constitutional error. The *Kotteakos* standard, we believe, *fills the bill.* (emphasis added)

Brecht, 507 U.S. at _, 113 S.Ct. at 1721-22.

The error of the Eighth Circuit's decision, which stands alone, is obvious in light of this Court's more recent holdings in *O'Neal* and *Kyles.*[6] However, if the Court nevertheless determines that this technical issue warrants plenary review, respondents request that review be limited only to this issue.

CONCLUSION

The petition for writ of certiorari should be denied.

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[6] *Compare Starr v. Lockhart,* 23 F.3d 1280 (8th Cir. 1994), *cert. denied,* _ U.S. _, 115 S.Ct. 499, with *Smith v. Dixon,* 14 F.3d 956 (4th Cir. 1994), *cert. denied,* _ U.S. _, 115 S.Ct. 129, *Brewer v. Reynolds,* 51 F.3d 1519, 1529 (10th Cir. 1995), and *Horsely v. Alabama,* 45 F.3d 1486, 1492 n.11 (11th Cir. 1995).